IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LUIGI E. AIELLO and JOSHUA SCOLMAN,

Plaintiffs,

v.

KELLY WEST, CATHY A. JESS, and PAUL LUDVIGSON,

Defendants.

OPINION AND ORDER

13-cv-562-wmc

Plaintiffs Luigi E. Aiello and Joshua Scolman allege in this proposed civil action that certain Wisconsin Department of Corrections employees violated their First and Fourteenth Amendment rights and certain provisions of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.*, by limiting access to Jewish religious services, denying Seder meals at Passover, and reducing the number of ready-to-eat kosher meals. Because Aiello and Scolman are incarcerated at Waupan Correctional Institution, the court must screen the complaint pursuant to the Prison Litigation Reform Act ("PLRA") to determine whether it is (1) frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915A. Because plaintiffs meet this step as to both claims under the First Amendment and RLUIPA, they will be allowed to proceed past the screening stage and defendants will be required to respond.

ALLEGATIONS OF FACT

In addressing any pro se litigant's complaint, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972). In his complaint, plaintiffs allege, and the court assumes for purposes of this screening order, the following facts.

A. The Parties

Plaintiffs Luigi E. Aiello and Joshua Scolman are both prisoners of the State of Wisconsin confined, at all times relevant to this complaint, at the Waupan Correctional Institution. Both plaintiffs also practice Judaism.

Defendant Kelli West is the Religious Practices Coordinator for the Wisconsin Department of Corrections ("DOC") and allegedly responsible for the policies and other actions challenged in plaintiffs' complaint. Defendant Cathy A. Jess is the Administrator of the Division of Adult Institutions ("DAI") for the DOC. Jess is allegedly responsible for the creation and implementation of the challenged DAI policies. Defendant Paul Ludvigson is the Corrections Program Supervisor at Waupan and responsible in that capacity for the treatment and programming needs of inmates, including religious programming. All defendants are being sued in their individual and official capacities.

B. Alleged Violations

Plaintiff Aiello describes in great detail his prior practice of Judaism at Columbia Correctional Institutional and at Green Bay Correctional Institution. The court need not describe these allegations here other than to note that Aiello had access to weekly Shabbat services and was able to celebrate Passover through Seder meals.

In 2006, the DOC adopted DAI Policy & Procedure 309.61.01, effective July 24, 2006. According to plaintiffs, this policy and other actions of defendants caused or contributed to certain constitutional violations. *First*, under the policy, Waupan stopped the plaintiffs from attending Shabbat services in the chapel on Friday afternoons. Instead, matzo and grape juice were sent to plaintiffs' cells so that they could perform the rituals alone, in their respective cells. Plaintiffs allege that they were informed on January 10, 2012, that there would be no Jewish services until further notice due to a lack of volunteer. At some point, Dr. Sam Appau, the Waupan Chaplain, agreed to supervise the Jewish services, which eventually occurred on a weekly basis through 2012. In December 2012, Appau left Waupan and his replacement, Chaplain Francis took over supervision of a weekly service. On January 8, 2013, Rabbi Mitchell Cohen became the new rabbi volunteer. Even though Rabbi Cohen could only come on a bi-monthly basis, plaintiffs were allowed to continue weekly service with Chaplain Francis continuing as a supervisor. On February 14, 2013, Chaplain Francis informed plaintiffs that they could no longer come to the chapel without a rabbi.

Second, Waupan began to deny plaintiffs special food accommodations for Passover, as well as regular Friday Shabbat matzo and grape juice, because it violated DOC's practice of providing special foods only on one holiday each year. From 2006 through 2011, Rabbi Moshe Stallman, the Jewish Representative on the DOC Religious Advisory Committee, donated the food and drink for Seder meals and Passover. Since donated from a religious source, DOC apparently did not consider this practice to be a violation of its practice against providing special foods for more than one holiday per year. On December 1, 2011, when Rabbi Stallman's term as the Jewish Representative on the Religious Advisory Committee ended, defendant West and the other members of the Committee eliminated the DOC's

practice of providing the Seder Meal for the Jewish holiday of Passover. Plaintiffs allege that no other religious group was similarly deprived a religious meal, and that it was a state-wide action, not limited to Waupan.

On January 31, 2013, Chaplain Francis issued a memo per defendant West that: (1) the institution would not be providing the ingredients for the Seder meals; (2) no donations for the Seder meals would be accepted from an outside religious group; and (3) plaintiffs could not purchase the ingredients for the Seder meals. As an alternative, plaintiffs would be provided a photocopy of a Seder plate. Plaintiffs allege Rabbi Cohen opposed this decision. At some point, the DOC agreed to allow Rabbi Cohen to bring in the ingredients for one Seder and lead plaintiffs in the service, though plaintiffs allege West maintained that plaintiffs could not actually "eat" during the Seder. Defendant Ludvigson allegedly affirmed the denial of the Passover Seder, suggesting plaintiffs could use a picture instead.

Third, beginning in August 2012, Waupan began reducing the number of hot, ready-to-eat kosher meals at lunch under the brand name "My Own Meal," and substituting peanut butter and jelly with saltines for the evening kosher meal. On November 4, 2012, Waupan began only serving one hot, ready-to-eat meal to Jewish inmates keeping kosher, while Muslim inmates at Waupan who maintain a Halal diet and vegetarians both continue to receive two hot "My Own Meals" per day.[1] Plaintiffs also allege that the peanut butter and jelly with saltines dinner does not provide sufficient nutritional value.

[1] Plaintiff Aiello also details his 2008 request, resubmitted in 2009 and 2010, for permission to celebrate the holiday of Sukkot. (Compl. (dkt. #1) ¶¶ 11-15.) As far as the court can tell, these allegations were not part of his administrative complaints. Moreover, they seem separate and distinct from plaintiffs' common, core claims asserted in their complaint. As such, the court has not recounted them here. If plaintiffs have exhausted this particular claim and wish to assert it as part of their denial of access to Jewish religious services in this

C. Administrative Complaints

Plaintiffs filed three inmate complaints concerning the above alleged violations. First, on February 8, 2013, plaintiffs filed an inmate complaint about the denial of Seder meals for Passover. This complaint was dismissed, and the dismissal was affirmed on appeal. On March 28, 2013, plaintiffs filed an inmate complaint concerning the reduction of Jewish services. This complaint was also dismissed, and affirmed on appeal. On April 19, 2013, plaintiffs filed an inmate complaint concerning the reduction of ready-to-eat hot kosher meals. This appeal was rejected by the inmate complaint examiner, which was affirmed on appeal.

OPINION

I. Free Exercise

The Supreme Court has held that "reasonable opportunities must be afforded all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty." *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972). Still, a prison's restriction on religious exercise will generally be upheld against First Amendment challenges so long as it is reasonably related to a legitimate correctional purpose. *Turner v. Safley*, 487 U.S. 78, 89 (1987).

The Religious Land Use and Institutional Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1(a)(1)-(2), provides more expansive protection than that afforded under the First Amendment, requiring that any state prison which receives federal funding "must

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lawsuit, the court would at least consider granting leave to do so, but this claim will not be screened to go forward in this order.

demonstrate . . . that the rule is the least restrictive means of achieving a compelling interest." *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003).[2] RLUIPA is designed to "protect[] institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter v. Wilkinson*, 544 U.S. 709, 721 (2005).

Ultimately, to prove an RLUIPA claim, a plaintiff bears the burden of establishing that defendants placed a substantial burden on the exercise of the plaintiff's religious beliefs. 42 U.S.C. § 2000cc-2(b); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). Although RLUIPA does not define the term "substantial burden," the Court of Appeals for the Seventh Circuit has held it is "one that necessarily bears a direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003). Moreover by statute, a "religious exercise" is "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). Under this definition, the religious exercise impacted by the prison regulation need not involve a central tenet, plaintiffs still must show either (1) lose of benefits or (2) that the prison applied pressure to modify behavior.

Under the First Amendment, RLUIPA, or both, courts have found a substantial burden where a prison: denied wine during Jewish services that normally called for it, *Sample v. Lappin*, 424 F. Supp. 2d 187, 194-95 (D. D.C. 2006); denied access to group worship, *Johnson-Bey v. Lane*, 863 F.2d 1308, 1312 (7th Cir. 1988); and refused to grant a nutritionally

[2] Although plaintiffs do not allege as much, it is reasonable to assume that the Waupan Correctional Institution receives and uses federal grant money. Therefore, the requirements of the Act apply to it. *See* 42 U.S.C. § 2000cc-1(b).

adequate, non-meat diet during the 40 days of Lent, *Nelson v. Miller*, 570 F.3d 868, 880 (7th Cir. 2009). Moreover, courts have found that the denial of a kosher diet violates the First Amendment or RLUIPA. *See Beerheide v. Suthers*, 283 F.3d 1179, 1188-89 (10th Cir. 2002) (holding plaintiffs denied kosher diet lacked alternative ways of maintaining a kosher diet); *Ashelman v. Wawrzaszek*, 111 F.3d 674, 677-78 (9th Cir. 1997) (holding provision of one kosher meal, with a choice of vegetarian or pork free meals for the other two violated the First Amendment). As such, the court finds that plaintiffs have sufficiently alleged that defendants' practices constitute a substantial burden on their exercise of Judaism.

Once a prisoner has shown that the actions of government officials have significantly burdened the exercise of the plaintiff's religious beliefs, then the burden shifts to defendants to demonstrate that their decision was the least restrictive means of furthering a compelling government interest. *See, e.g.*, *Murphy v. Zoning Commission of the Town of New Milford*, 148 F. Supp. 2d 173, 187 (D. Conn. 2001). Perhaps most notably, this court has previously held the DOC regulation limiting religious feasts to one per year was the least restrictive means of furthering government interest in security, management and resources problems connected with religious feasts. *Charles v. Verhagen*, 220 F. Supp. 2d 937, 946-47 (W.D. Wis. 2002).

Ultimately, whether the regulations pass strict scrutiny exceeds the bounds of review at this stage of the case, but plaintiffs have alleged enough, for this court to allow plaintiffs to proceed on claims that defendants violated the First Amendment's Free Exercise Clause and RLUIPA's substantial burden provision, 42 U.S.C. § 2000cc-2(b), by (1) eliminating Friday Shabbat services; (2) denying plaintiffs special food accommodations for Passover Seders; and (3) substituting peanut butter and jelly with saltines for the evening kosher meal.

II. Equal Treatment

Plaintiffs' claim concerning denial of two, hot kosher meals per day to practicing Jews, while allowing them to practicing Muslims, may be better understood as a challenge to the equal treatment of religions under the First Amendment's Establishment Clause. *See Kaufman v. McCaughtry*, 419 F.3d 678, 683 (7th Cir. 2005) (explaining that Establishment Clause "prohibits the government from favoring one religion over another without a legitimate secular reason"). Of course, differences in costs may provide a sufficient nonreligious basis to treat plaintiffs differently. For example, providing a Halal diet to Muslim inmates may cost significantly less. *See Johnson v. Horn*, 150 F.3d 276, 284-85 (3d Cir. 1998) (providing hot pork alternative to Muslims but only a cold kosher diet to Jews did not deny equal protection because a hot kosher diet would have required more effort from officials, making Jews and Muslims not similarly situated).

Again, however, these considerations are not resolvable at this stage of the case. Accordingly, the court finds that plaintiffs have adequately *plead* a claim that defendants violated the First Amendment Establishment Clause based on defendants' alleged differential treatment of Jewish inmates as compared to Muslim inmates in the provision of religious meals.

ORDER

IT IS ORDERED that:

1) Plaintiffs Luigi E. Aiello and Joshua Scolman's request to proceed against defendants Kelly West, Cathy A. Jess and Paul Ludvigson on claims under RLUIPA's substantial burden provision, 42 U.S.C. § 2000cc-2(b), and the First Amendment's Establishment and Free Exercise clauses is GRANTED.

2) For the time being, plaintiffs must send defendants a copy of every paper or document they file with the court. Once plaintiffs have learned what lawyer will be representing defendants, they should serve the lawyer directly rather than defendants. The court will disregard any documents submitted by plaintiffs unless plaintiffs show on the court's copy that they have sent a copy to defendants or to defendants' attorney.

3) Plaintiffs should keep a copy of all documents for their own files. If plaintiffs do not have access to a photocopy machine, they may send out identical handwritten or typed copies of his documents.

4) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiffs' complaint and this order are being sent today to the Attorney General for service on the defendants. Under the agreement, the Department of Justice will have 40 days from the date of the Notice of Electronic Filing of this order to answer or otherwise plead to plaintiffs' complaint if it accepts service for defendants.

Entered this 17th day of December, 2014.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge